Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

76-4591

In the

Supreme Court of the United States

OCTOBER TERM, 1976

COMMUNICATIONS WORKERS OF AMERICA, an unincorporated labor association,

Appellant,

v.

WESTERN ELECTRIC COMPANY, INCORPORATED, a New York corporation, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, Executive Director, State of Colorado, Department of Labor and Employment, Division of Labor, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, in his capacity as a member of the Industrial Commission of the State of Colorado, ALBERT F. MANGAN, in his capacity as a member of the Industrial Commission of the State of Colorado, and KENNETH C. RUSSELL, in his capacity as a member of the Industrial Commission of the State of Colorado, and THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, a Colorado corporation,

Appellees.

JURISDICTIONAL STATEMENT
APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

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COMMUNICATIONS WORKERS OF AMERICA, an unincorporated labor association,

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v.

WESTERN ELECTRIC COMPANY, INCORPORATED, a New York Corporation, STATE OF COLORADO, DEPARTMENT OF LABOR AND EMPLOYMENT, DIVISION OF LABOR, JAMES M. SHAFFER, Executive Director, State of Colorado, Department of Labor and Employment, Division of Labor, INDUSTRIAL COMMISSION OF THE STATE OF COLORADO, HENRY C. KIMBROUGH, in his capacity as a member of the Industrial Commission of the State of Colorado, ALBERT F. MANGAN in his capacity as a member of the Industrial Commission of the State of Colorado, and KENNETH C. RUSSELL, in his capacity as a member of the Industrial Commission of the State of Colorado, and THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, a Colorado corporation,

Appellees.

JURISDICTIONAL STATEMENT

Appeal From the Supreme Court of the State of Colorado

The Appellant, Communications Workers of America,

respectfully submits the following Jurisdictional Statement in its appeal from the judgment of the Supreme Court of the State of Colorado dated July 7, 1976 and the opinion issued by the Supreme Court of the State of Colorado in connection with said judgment, dated June 7, 1976 and modified on July 6, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Colorado is, as of yet, unreported and appears in Appendix B hereto. The opinion of the District Court in and for the City and County of Denver is reported at 88 LRRM 3481 and appears in Appendix A hereto.

JURISDICTIONAL GROUNDS

The within is an appeal pursuant to 28 U.S.C. §1257(2) from the opinion of the Supreme Court of the State of Colorado issued initially on June 7, 1976 and modified on July 6, 1976 and the judgment arising therefrom dated July 7, 1976. The Supreme Court of the State of Colorado denied the Appellant Communications Workers of America's Petition for Rehearing and Supplemental Petition for Rehearing by an undated order of which the Appellant Communications Workers of America received notice on July 6, 1976. The Notice of Appeal herein was filed by the Appellant Communications Workers of America in the Supreme Court of the State of Colorado on July 19, 1976; an Amended Notice of Appeal was filed on September 9, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257(2). Cases believed to sustain jurisdiction in this matter include *Huffman v. Pursue, Ltd.*, _____ U.S. _____, 95 S.Ct. 1200

(1975); *Cohen v. California*, 403 U.S. 15 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *LaCrosse Tel. Corp. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 18 (1949); *Reconstruction Finance Corp. v. Beaver County, Pa.*, 328 U.S. 204 (1946); *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

The within appeal involves the constitutionality of 1973 C.R.S. §8-3-108(1)(c) of the Colorado Labor Peace Act as applied to employers and labor organizations in interstate commerce. 1973 C.R.S. §8-3-108(1)(c) is found at p. 334 of the Colorado Revised Statutes 1973. The text of the Colorado Labor Peace Act is set forth in Appendix C hereto. Sections 7, 8(a)(1), 8(a)(3), 9 and 14(b) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §§157, 158(a)(1), 158(a)(3), 159 and 164(b), are relevant to this appeal and are set forth in Appendix C hereto.

QUESTIONS PRESENTED BY THE APPEAL

1. May the State of Colorado pursuant to §14(b) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §164(b), require, as a condition precedent to the right to enter into a valid union security provision, all or part of a bargaining unit certified or recognized under the Labor Management Relations Act of 1947, as amended, to constitute itself as a "collective bargaining unit" in accordance with 1973 C.R.S. §8-3-104(4) of the Colorado Labor Peace Act?

2. May the State of Colorado pursuant to §14(b) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §164(b), require, as a condition precedent to the conduct of an "all-union" referendum under 1973 C.R.S. §8-3-108(1)(c), all or a portion of a bargaining unit certified or recognized under the Labor Management Relations Act of 1947,

as amended, to constitute itself as a "collective bargaining unit" in accordance with 1973 C.R.S. §8-3-104(4) of the Colorado Labor Peace Act?

3. May the State of Colorado pursuant to §14(b) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §164(b), require, as a condition precedent to the enforcement of a union security provision, the conduct of an "all-union" referendum under 1973 C.R.S. §8-3-108(1)(c) of the Colorado Labor Peace Act?

STATEMENT OF THE CASE

The within appeal is from the final judgment of the Supreme Court of the State of Colorado [hereinafter, Colorado Supreme Court] dated July 7, 1976. [App. B at 33] The initial opinion of the Colorado Supreme Court in this matter was issued on June 7, 1976. The Appellant Communications Workers of America [hereinafter, CWA] filed a Petition for Rehearing pursuant to C.A.R. 40 on June 16, 1976 [R.717][1] and a Supplemental Petition for Rehearing on June 29, 1976. [R. 729] CWA's Petition for Rehearing and Supplemental Petition for Rehearing were denied by an undated order of the Colorado Supreme Court. [App. B at 32] CWA received notice of such denial by letter dated July 6, 1976. [*Id.* at 34] CWA filed a Notice of Appeal pursuant to Rule 10 of this Court on July 19, 1976 and an Amended Notice of Appeal on September 9, 1976. [App. D at 1;4]

This appeal arises from two civil actions filed on August

[1]Simultaneously with the filing of the within Jurisdictional Statement, CWA has filed the Record in this matter. References to such Record shall be by reference to the page of the Record as assigned thereto by the Clerk of the Colorado Supreme Court and, where appropriate, to the name of the pleading or document referred to and paragraph number thereof. In such references the Record shall be refered to as "R."

4, 1970 in the District Court in and for the City and County of Denver [hereinafter, Colorado District Court] by CWA seeking, *inter alia*, a declaratory judgment pursuant to 1963 C.R.S. §77-11-1[2] and Colo.R.Civ.P. 57 that certain union security provisions[3] could be lawfully enforced in the State of Colorado. [App. B at 3-4] The first of such actions was assigned Civil Action No. C-18238 and named as defendants The Mountain States Telephone & Telegraph Company [hereinafter, Mountain States]; the State of Colorado, Department of Labor and Employment, Division of Labor [hereinafter, Department of Labor and Employment]; the Executive Director of the Department of Labor and Employment; the Industrial Commission of the State of Colorado [hereinafter, Industrial Commission]; and the individual members of the Industrial Commission in their official capacities. [R.5] The second of such actions was assigned Civil Action No. C-18239 and named as defendants the Western Electric Company, Inc. [hereinafter Western Electric] and the same agencies and officers of the State of Colorado as in Civil Action No. C-18238. [R.91][4] On March 21, 1972 the several parties to Civil Action No. C-18238 filed a Stipulated Record of Evidence and an attendant Rule 7 Affidavit, and by order dated March 24, 1972 these parties were permitted to submit an agreed case pursuant to Colo.R.Civ.P. 7(d).[5] [R.67-80] On March 27, 1973 the several

[2]This provision, under the Colorado Revised Statutes 1973, has been renumbered as §13-51-105.

[3]The term "union security provision(s)" shall be used herein as referring to any collective bargaining agreement provision requiring an employee covered thereunder to tender uniformly required, periodic dues and reasonable initiation fees to a labor organization as a condition of continued employment after the thirtieth day of such employment.

[4]The Complaints in both civil actions were subsequently amended [R. 34; 122], but such amendments are of no moment to the within appeal.

[5]Colo.R.Civ.P. 7(d) reads in material part:

". . .Parties to a dispute which might be the subject of a civil

(Continued on Page 6)

parties to Civil Action No. C-18239 filed a Stipulated Record of Evidence [R.162], a Rule 7 Affidavit [R.160], and a Joint Motion to Consolidate Civil Action No. C-18239 with Civil Action No. C-18238 [R.154]; on that same date the parties to Civil Action No. C-18238 filed a Stipulation Concerning Consolidation [R.81] consenting to the consolidation of the two civil actions. The Colorado District Court before which Civil Action No. C-18239 was pending approved that matter for consolidation with Civil Action No. C-18238 by order dated March 27, 1973 [R.157], and on that date such civil action was approved as an agreed case pursuant to Colo.R.Civ.P. 7(d) [R.158].

In each of the Stipulated Records of Evidence the parties agreed, *inter alia*, that no "all-union" referendum had been conducted by the Colorado Division of Labor as contemplated in 1963 C.R.S. §80-4-6(1)(d)[6] and that "a justiciable controversy exists between the plaintiff and the several defendants concerning the application of [certain union security provisions] in the State of Colorado since a controversy has arisen between the plaintiff and the defendants as aforesaid, concerning the scope of the alleged prohibitory or regulatory provisions of the Colorado Labor Peace Act, C.R.S. §80-4-1, *et seq.* (1963) as amended, and the effect of such statutory scheme upon the construction of said provisions as between the plaintiff and defendant[s], [Mountain States and Western Electric]." [R.72, 73-74; 168, 171] The union security provisions

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action may, without pleading, file, in the court which would have had jurisdiction if an action had been brought, an agreed statement of facts. The same shall be supported by an affidavit in good faith to determine the rights of the parties. The matter shall then be deemed an action at issue and all proceedings thereafter shall be as approved by these rules."

[6]This provision in the Colorado Revised Statutes 1973 has been renumbered as §8-3-108(1)(c).

referred to above were contained in seven different collective bargaining agreements. Three of these collective bargaining agreements ran between CWA and Mountain States; the remaining four ran between CWA and Western Electric.

The three CWA-Mountain States agreements were: (1) the May 9, 1968 - May 8, 1971 Plant Department Agreement [hereinafter, 1968 Mountain States Plant Agreement];[7] (2) the May 9, 1968 - May 8, 1971 Traffic Department Agreement [hereinafter, 1968 Mountain States Traffic Agreement];[8] and (3) the July 18, 1971 - July 17, 1974 Plant and Traffic Departments Agreement [hereinafter, 1971 Mountain States Agreement].[9] The four collective bargaining agreements between CWA and Western Electric were: (1) the May 1, 1968 - April 30, 1971 Agreement denominated as Contract CWA-12;[10] (2) the May 1, 1968 - April 30, 1971 Agreement denominated as Contract CWA-JC-12;[11] (3) the July 18, 1971 - July 17, 1974 Agreement denominated as Contract CWA-13; and (4) the July 18, 1971 - July 17, 1974 Agreement denominated as Contract CWA-JC-13.[12]

The union security provision contained in the 1968 Mountain States Plant Agreement read:

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[7]The 1968 Mountain States Plant Agreement is annexed as Exhibit A to the Stipulated Record of Evidence in Civil Action No. C-18238.

[8]The 1968 Mountain States Traffic Agreement is annexed as Exhibit B to the Stipulated Record of Evidence in Civil Action No. C-18238.

[9]The 1971 Mountain States Agreement is annexed as Exhibit C to the Stipulated Record of Evidence in Civil Action No. C-18238.

[10]Contract CWA-12 is annexed as Exhibit 1 to the Stipulated Record of Evidence in Civil Action No. C-18239.

[11]Contract CWA-JC-12 is annexed as Exhibit 2 to the Stipulated Record of Evidence in Civil Action No. 18239.

[12]Contracts CWA-13 and CWA-JC-13 are contained in the single document annexed as Exhibits 6 and 7 to the Stipulated Record of Evidence in Civil Action No. C-18239.

"ARTICLE 14

Maintenance of Dues

14.1 Each employee who is a member of the Union on or after the 30th calendar day following the beginning of his employment or on or after the effective date of this Agreement, whichever is the later, shall as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the termination of this Agreement, except that each such employee may, within the 10-day period immediately preceding May 9, 1971, upon which date the Agreement terminates, terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company in writing of his withdrawal from membership in the Union.

14.2 Said condition of employment shall reapply to any such employee after his return to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any leave of absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

14.3 The provisions of this Article shall not apply to any employee in any state in which the application of such provision would be inconsistent with the law of such state.

14.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article." [App. B at 5-6]

The union security provision contained in the 1968 Mountain States Traffic Agreement was substantively the same as that in the 1968 Mountain States Plant Agreement. [App. B at 6-7] These union security provisions were modified in the 1971 Mountain States Agreement to read as follows:

"ARTICLE 21

Modified Agency Shop

21.1 Each regular employee who is a member of the Union on the date of ratification or approval of this agreement by the President of the Union, whichever is later, or who later becomes a member of the Union and all regular employees hired on or after that date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of regular employees hired on or after such date of ratification or approval, 30 days after hire, whichever of these dates is later until the termination of this contract, except that an employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable, his withdrawal from membership in the Union by registered mail, return receipt requested, and postmarked within the ten-day calendar period immediately preceding 11:59 P.M., July 28, 1971.

21.2 Said condition of employment shall reapply to any such employee after returning to the bargaining unit following any transfer out of the bargaining unit, any removal from the payroll of the Company, or any leave of

absence of more than one month's duration, provided such employee is a member of the Union on or after the 30th day following return to the bargaining unit.

21.3 The provisions of this Article shall not apply to any employee in any state in which the application of such provision would be inconsistent with the law of such state.

21.4 The Company may inform employees and applicants for employment of their rights and obligations under the provisions of this Article." [*Id.* at 8-9]

The union security provisions in the several Western Electric agreements closely paralleled those quoted above. In Contract CWA-12 the union security provision read:

"ARTICLE 24

Maintenance of Union Dues

1. Each Employee who is a member of the Union:

(a) on or after the 30th calendar day following the beginning of his employment, or

(b) on or after the effective date of this contract whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this contract, except that each such Employee may, within the ten (10) day period immediately preceding the termination date of this contract, terminate his obligations to tender periodic Union dues to the Union as a condition of

employment by notifying both the Union and the Company of his withdrawal from membership in the Union.

1.1 Said condition of employment shall reapply to any such Employee after his return to the bargaining unit following any period of formal separation* therefrom, provided such Employee is a member of the Union on or after the 30th day following his return to the bargaining unit.

*Includes:
Transfers out of the bargaining unit.
Removal from the payroll of the Company.
Leaves of Absence of more than one (1) month duration.

2. The provision of this Article 24 shall not be effective if inconsistent with the law of the applicable State.

3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this Article 24." [*Id.* at 10-11]

The union security provisions in Contract CWA-JC-12 were substantively the same as those in Contract CWA-12. [*Id.* at 11-12] In 1971 the union security provisions of Contract CWA-12 were amended to read as follows in Contract CWA-13:

"ARTICLE 24

Union Security

1. Each Employee who is a member of the Union on the date of ratification or approval of this Contract by

the President of the Communications Workers of America, whichever is later, or who later becomes a member of the Union and all Employees hired on or after such date shall as a condition of employment pay or tender to the Union amounts equal to the periodic dues applicable to members for the period from such date of ratification or approval or the date of later becoming a member or, in the case of Employees hired on or after such date of ratification or approval, thirty (30) days after hire, whichever of these dates is later until the termination of this Contract, except that an Employee may terminate this condition of employment by giving written notice to the Company and the Union of such termination, and, if applicable his or her withdrawal from membership in the Union, by registered mail, return receipt requested, and postmarked within the ten (10) day calendar period immediately preceding 11:59 P.M. July 21, 1971.

2. The condition of employment specified in Paragraph 1 shall not apply during the periods of formal separation* from the bargaining unit by any such Employee but shall reapply to such Employee on the thirtieth (30th) day following his or her return to the bargaining unit.

> *The term 'formal separation' includes transfers out of the bargaining unit, removal from the payroll of the Company and Leaves of Absence of more than one (1) month duration.

3. The Company may inform Employees and applicants for employment of their rights and obligations under the provisions of this article.

4. This article snall apply only in those States and the District of Columbia where the law permits the Union

> to enter into this type of union security agreement. If during the term of this Contract the Union shall become duly authorized under the laws of any other State to enter into this type of union security agreement, the effective date of this article as to Employees in such State shall be the date upon which the Company receives proper written evidence from the Union that is fully qualified to enter into such an agreement in such State." [*Id.* at 13-15]

Again, the union security provisions in Contract CWA-JC-13 were substantively the same as those in Contract CWA-13. [*Id.* at 15-16]

It is undisputed that Mountain States and Western Electric are engaged in commerce and are subject to the Labor Management Relations Act of 1947, as amended [hereinafter, federal Act], 29 U.S.C. §141 *et seq*. Mountain States is a Colorado corporation doing business in the States of Arizona, Colorado, Idaho, Montana, New Mexico, El Paso County, Texas, Utah and Wyoming. [R.67] The geographical scope of the several Mountain States Agreements is almost as broad as that of Mountain States itself.[13] Western Electric is a New

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[13]Article 1.1 of the 1968 Mountain States Plant Agreement recognized "the Union as the exclusive bargaining agent for all eligible employees in the Plant Department in the States of Arizona, Colorado, Idaho, New Mexico, Utah, Wyoming, and El Paso County, Texas whose titles are included in the list of job titles contained in Appendix B, attached hereto. . . ." Article 1.1 of the 1968 Mountain States Traffic Agreement provided that Mountain States recognized CWA "as the exclusive bargaining representative for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment, for all of the eligible non-supervisory employees in the Traffic Department of the Company as listed by titles and wage rates in Attachment B of this Agreement in the States of Arizona, Colorado, Idaho, New Mexico, Utah, Wyoming, and El Paso County,

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York corporation duly authorized to do business in the State of Colorado "as the manufacturing and supply unit of the Bell System and, as such, manufactures, supplies and furnishes services and materials to Bell System Associated companies in all of the States of the United States of America, including [Mountain States]...." [R.163] The several Western Electric contracts at issue cover a broad geographical area encompassing much of the United States.[14] It is further stipulated that CWA is the certified bargaining representative of the employees covered under the several Western Electric contracts at issue. [R.162-63][15] It is also undisputed that both Mountain States and Western Electric have refused and/or have failed to enforce the several union security provisions quoted above as to their Colorado employees because of certain provisions of the Colorado Labor Peace Act [hereinafter, Labor Peace Act], 1973 C.R.S. §8-3-101 *et seq.*[16] [App. B at 8,13].[17]

Texas...." Article 1.1 of the 1971 Mountain States Agreement provided that Mountain States recognized CWA as the exclusive bargaining representative for the employees covered under such Agreement in the States of Arizona, Colorado, Idaho, New Mexico, Utah, Wyoming, and El Paso County, Texas. Additionally, Article 1.1 of the 1971 Mountain States Agreement provided that Mountain States recognized CWA as the exclusive bargaining agent for certain employees in the State of Montana.

[14]See Contract CWA-12 at Article 12 and Appendix 1; Contract CWA-JC-12 at Article 11 and Appendix 2; Contract CWA-13 at Article 12 and Appendices 2, 3 and 4; and Contract CWA-JC-13 at Article 11 and Appendices 2 and 3.

[15]See Contract CWA-12 at p. 1; Contract CWA-JC-12 at p. 1; Contract CWA-13 at p. 1; and Contract CWA-JC-13 at p. 1.

[16]All references herein to the Labor Peace Act shall be, unless otherwise noted, to its recompilation in Colorado Revised Statutes 1973.

[17]The Stipulated Record of Evidence in Civil Action No. C-18238 provided that Mountain States refused CWA's demand that certain employees covered under the 1968 Plant and Traffic Agreements be discharged for failure to comply with the union security provisions therein because such "provisions were of no effect in light of the provisions of the...Labor Peace Act...." [R.72] See also, Appendix B at 8. The Stipulated Record of Evidence in Civil Action No. C-18239 provided that Western Electric refused to dismiss certain employees upon

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CWA argued, *inter alia*, before the Colorado District Court that the "all-union" referendum provisions of the Labor Peace Act were not intended to extend to the union security provisions at issue, to the federally recognized bargaining units involved or to any federally recognized bargaining units.[18] If, however, the Labor Peace Act were deemed to so extend, CWA urged that the "all-union" referendum provisions were unconstitutional. The Colorado District Court rejected both contentions. It held that the "all-union" referendum provisions were intended to reach federally recognized bargaining units and that such provisions could be constitutionally applied:

> "...The provisions of the...Labor Peace Act...apply to union security clauses in collective bargaining agreements negotiated by multi-state employers engaged in interstate commerce and doing business within the State of Colorado and to national labor organizations whenever the collective bargaining agreement in issue is applicable to a local union operating or headquartered within the State of Colorado....To rule otherwise in this case would invalidate sub silentio the Congressional intent implicit in

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the demand of CWA because of their failure to comply with the union security provisions in Contracts CWA-12 and CWA-JC-12 since "'[c]ertain provisions of the laws of the State of Colorado prohibited an employer from entering into an agreement with representatives of its employees which provides for union security unless the Industrial Commission of Colorado certifies that three-quarters or more of the bargaining unit employees voting in a referendum shall have voted affirmatively in favor of such an agreement.'" [R.167] See also, Appendix B at 13.

[18]The term "federally recognized bargaining unit" as used herein shall mean an employee unit appropriate for collective bargaining within the meaning of §9 of the federal Act, 29 U.S.C. §159, which status has been secured either through certification of the National Labor Relations Board [hereinafter, NLRB] or through voluntary recognition by the employer. See, *National Labor Rel. Bd. v. Gissel Packing Co.*, 395 U.S. 575, 595-97 (1969).

the Wagner Act and Section 14(b) of the National Labor Relations Act and render impotent the power of the State of Colorado validly exercised in the. . .Labor Peace Act to regulate union security and to preserve the rights of employees within the boundaries of the State of Colorado. No such conclusion was intended by the drafters of the Wagner Act, and therefore, this Court concludes that the. . .Labor Peace Act is applicable to collective bargaining agreements, including those in issue here, executed between employers and labor organizations subject to the National Labor Relations Act in all areas, including union security, reserved specifically to the states by the National Labor Relations Act." [App. A at 24]

The Colorado District Court had earlier held that the regulation of union security provisions by the Labor Peace Act was not preempted by the federal Act:

". . .Neither the National Labor Relations Act, the Taft-Hartley Amendments, nor any other federal legislation has operated to preempt the provisions of the. . .Labor Peace Act regulating union security clauses as 'all-union' agreements requiring an 'all-union' referendum as a prerequisite to their validity. . . .The State of Colorado retains jurisdiction to prohibit or regulate all such union security clauses beginning with their 'actual negotiation and execution.' . . .The Colorado Supreme Court. . .also concluded that resolution of the question of the union security had always been left totally to the states, including the State of Colorado, and that the State of Colorado had chosen to regulate union security through the vehicle of the. . .Labor Peace Act." [*Id.* at 21-22]

The Colorado District Court's opinion and judgment were

rendered on September 9, 1974. [*Id.* at 42] On October 7, 1974 CWA filed a Notice of Appeal to the Court of Appeals for the State of Colorado [hereinafter, Colorado Court of Appeals]. [R.224] On March 4, 1975 CWA filed a Petition for Writ of Certiorari in the Colorado Supreme Coure requesting that, pursuant to C.A.R. 50, certiorari issue to the Colorado Court of Appeals prior to judgment by that Court. [R.599] On March 12, 1975 the several parties to the appeal filed a Joint Motion to the Court of Appeals to Request Transfer of Appeal to the Supreme Court. [R.377] By order dated March 20, 1975 the Colorado Court of Appeals referred the appeal to the Colorado Supreme Court pursuant to §§13-4-109 and 110 and requested the Colorado Supreme Court to determine the question of jurisdiction thereunder. [R.598] After consideration of the request of the Colorado Court of Appeals and CWA's Petition for Writ of Certiorari, the Colorado Supreme Court accepted jurisdiction over the appeal by order dated March 27, 1975. [R.679]

At the time of the Colorado Supreme Court's assumption of jurisdiction over the appeal, all briefs of the parties and the several *amicii curiae* had been filed except CWA's Reply Brief tendered to the Colorado Court of Appeals on March 28, 1975. [R.642] CWA argued, as before the Colorado District Court, that the "all-union" referendum provisions of the Labor Peace Act were not intended to extend to federally recognized bargaining units or to the union security provisions at issue but that, if the Labor Peace Act were construed to so extend, its "all-union" referendum provisions were unconstitutional. [R.301, 308-25 (Opening Brief at 10, 17-34); R. 654-61 (Reply Brief at 7-14)] CWA contended, *inter alia*, that an "all-union" referendum could only be conducted within the confines of a "collective bargaining unit" as defined in §8-3-104(4). [R.301-04 (Opening Brief at 9-12); R.649-54 (Reply Brief at 2-7)]

Because requirements for "collective bargaining unit" status differed from those giving rise to federally recognized bargaining unit status, CWA argued that the "all-union" provisions impermissibly infringed upon §7 rights of employees under the federal Act and upon §9 authority of the NLRB. [R.303-08, 309-17 (Opening Brief at 12-17, 18-26); R.652, 654-56 (Reply Brief at 5, 7-9)] CWA also contended that the Labor Peace Act's complex regulatory scheme fell without the scope of §14(b) of the federal Act, 29 U.S.C. §164(b), which, CWA argued, permits states to prohibit, but not regulate, the application of union security provisions. [R.317-19 (Opening Brief at 26-28); R.657-61 (Reply Brief at 10-14)] The Colorado Supreme Court concurred in CWA's contention that an "all-union" referendum could only be held among the employees of a "collective bargaining unit" and further held that "collective bargaining unit" status was a condition precedent to any labor organization's right to enter into an "all-union agreement:"

"...In our opinion, the statute plainly directs that the referendum should be conducted among the employees of a collective bargaining unit....

"All of the bargaining units involved in this appeal have been recognized or certified by the National Labor Relations Board, and no evidence suggests that any of them were established by a secret ballot election pursuant to §[8-3-104(4)]. In our view, a secret ballot election, as described by §[8-3-104(4)], is the exclusive method by which a collective bargaining unit subject to the 'all-union' referendum provisions of §[8-3-108(1)(c)] may be recognized. Correlatively, we hold that a collective bargaining unit, as defined by §[8-4-104(4)], is a condition precedent to any labor organization's right to enter into an all-union agreement with an employer under Colorado law. Inasmuch as no secret ballot election was conducted for the purpose of establishing a collective bargaining unit authorized to enter into an all-union agreement with Mountain States and Western Electric, C.W.A. is not entitled to the enforcement of the all-union agreement provisions which are, in our opinion, invalid. Even if such an election had been held and an appropriately authorized collective bargaining unit had been established, the union security provisions here in issue would be invalid and unenforceable because of the lack of employee approval through an all-union referendum." [App. B at 22-23]

The Colorado Supreme Court concurred in CWA's contention that certification or recognition requirements under the federal Act differed from those attendant to "collective bargaining unit" status:

"We agree that certification or recognition under the Federal Act is different than the recognition/definition section of the Colorado Labor Peace Act. The Colorado Labor Peace Act requires a secret ballot election conducted by the Division of Labor in which a majority of the employees of the employer or a majority of the employees in a craft must vote." [*Id.* at 24]

However, it is disagreed with CWA's argument that the requirement of "collective bargaining unit" status, as incorporated in §8-3-108(1)(c), vitiated the constitutionality of the Labor Peace Act's "all-union" referendum provisions:

"The issue of a state's power to recognize or certify collective bargaining units must not be confused with a state's power to regulate union-security agreements. In Algoma Plywood and Veneer Co. [v. Wisconsin Emp. Rel.

Bd., 336 U.S. 301 (1949)], the United States Supreme Court held that '[t]he character of activities left to State regulation is not changed by the fact of certification.' We agree. In Colorado, a 'collective bargaining unit' for purposes of the union security agreement provision of the Colorado Labor Peace Act, may be something different than a collective bargaining unit for other purposes of labor-management relations. In the context of §[8-3-108(1)(c)], a collective bargaining unit is a unique entity which may only be established pursuant to the requirements of §[8-3-104(4)]. Viewed as such, the procedures for establishing a collective bargaining unit under the Colorado Labor Peace Act are merely an incident of the state's power to prohibit the application of union security agreements under the permissive grant of authority contained in §14(b) of the Taft-Hartley Act. The application of §[8-3-104(4)] to the union security provisions of the Colorado Labor Peace Act is severable from its application in other contexts of the Act.

A valid all-union agreement may only be entered after the establishment of a collective bargaining unit in accordance with §[8-3-104(4)]. Having failed to properly define such collective bargaining units prior to entering the agreement here in issue, C.W.A. cannot properly demand that the employers enforce these invalid agreements." [*Id.* at 28-29]

The Colorado Supreme Court also disagreed with CWA's contention that the regulatory scheme of the "all-union" referendum provision of the Labor Peace Act fell without §14(b):

"C.W.A. contends that states, pursuant to §14(b), are allowed to 'prohibit' but not to 'regulate' union security agreements. No matter how this distinction may be interpreted, §14(b) does allow states to prohibit the 'application' of union security agreements. . . .

• • •

"In short, Colorado was entitled under §14(b) to enact §[8-3-108(1)(c)] of the Colorado Labor Peace Act, and the state's power to prohibit the application of the union security provision here in issue is not preempted by federal law." [*Id.* at 29,30]

As the above would indicate, the Colorado Supreme Court found the "all-union" referendum provisions of the Labor Peace Act applicable "to union security clauses in collective bargaining agreements negotiated and executed by multi-state employers engaged in interstate commerce and doing business in Colorado." [*Id.* at 31] It concluded:

"Accordingly, we hold that the disputed clauses of the collective bargaining agreements between C.W.A. and Mountain States and between C.W.A. and Western Electric are union security clauses subject to state control under the Colorado Labor Peace Act. As enacted, the clauses were invalid because they were not approved through an all-union referendum by an appropriately designated employee group. C.W.A. may not rely on these clauses to effectuate a discharge of an employee refusing to comply with the terms thereof. Mountain States and Western Electric lawfully refused C.W.A.'s demands that the employees be discharged." [*Ibid.*]

Mr. Chief Justice Pringle of the Colorado Supreme Court dissented from the above opinion. In relevant part, Mr. Chief Justice Pringle stated:

"I think there is no disagreement that the National Labor Relations Act, as amended, preempts labor relations from state regulation except when such is specifically authorized by the Act itself. Section 14(b) of the Taft-Hartley amendment does provide that states may *prohibit,* and I emphasize the word used is *prohibit,* the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory. It does not, in its express language, allow states to regulate or do anything other than prohibit such agreements.

• • •

"I know the time-worn legal cliche that whatever a state can prohibit it can regulate. But this is not the situation for its application. We are here dealing with original pre-emption of the entire field by the federal government and the cession back to the states of a portion of that field. As I have pointed out, the history of that cession does not permit this court to reach out, as I think it does here, to grant the state powers not expressly given it by the Act itself. . . ." [*Id.* at 31-32] [Emphasis in original]

GROUNDS SHOWING SUBSTANTIAL FEDERAL QUESTIONS

THE WITHIN APPEAL RAISES SUBSTANTIAL FEDERAL QUESTIONS CONCERNING THE SCOPE OF §14(b) OF THE FEDERAL ACT, WHICH SHOULD BE RESOLVED BY THIS COURT BECAUSE OF THE SERIOUS PREEMPTION ISSUES PRESENTED BY THE COLORADO SUPREME COURT'S DECISION HEREIN.

As noted above, the Colorado Supreme Court rejected CWA's several preemption arguments concerning the "all-union" provisions of the Labor Peace Act on the basis of its expansive reading of §14(b) of the federal Act. Thus, "the procedures for establishing a collective bargaining unit under the Colorado Labor Peace Act are merely an incident of the state's power to prohibit application of union security agreements under the permissive grant of authority contained in §14(b) of the Taft-Hartley Act." [App. B at 28-29] "No matter how this distinction [between state statutes prohibiting union security provisions and those regulating union security provisions] may be interpreted, §14(b) does allow states to prohibit the 'application' of union security agreements." [*Id.* at 29] "In short, Colorado was entitled under §14(b) to enact §[8-3-108(1)(c)] of the Colorado Labor Peace Act, and the state's power to prohibit the application of the union security provisions here in issue is not preempted by federal law." [*Id.* at 30] CWA submits that the Colorado Supreme Court's decision herein constitutes a far broader construction of §14(b) than accorded under any decision of this Court interpreting such provision. CWA further submits that the Colorado Supreme Court's construction of §14(b) raises substantial questions concerning the degree, if any, to which a state may regulate the negotiation and application of union security provisions between labor organizations and employers subject to the federal Act when such regulation results in infringement upon rights guaranteed under §7 of the federal Act and upon the exclusive authority of the NLRB under §9.

The uniqueness of the Labor Peace Act's operation is apparent from a review of the Colorado Supreme Court's decision herein. However, a brief analysis of the Labor Peace Act's statutory framework is useful in developing the substantial federal questions at issue herein.

A. *The Statutory Scheme of the Labor Peace Act.*

The Labor Peace Act is a complex statute. The source of much of its complexity lies in §8-3-104 which defines various terms used throughout the statute in a highly specialized manner. Perhaps the most important of these definitions is that of a "collective bargaining unit":

> "... 'Collective bargaining unit' means an organization selected by secret ballot, as provided in §8-3-107, by a majority vote of the employees of one employer employed within the state who vote at an election for the selection of such a unit, except that, where a majority of the employees engaged in a single craft, division, department, or plant have voted by secret ballot that the employees of such single craft, division, department or plant shall constitute their collective bargaining unit, it shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative or [representatives][19] where a majority of the employees in each separate unit have voted to do so by secret ballot, as provided in §8-3-107."

The term "collective bargaining unit" is integral to the entire operation of the Labor Peace Act because, as reflected in several provisions throughout the statute, no collective bargaining obligations can arise unless and until a "collective bargaining unit" exists. Thus, §8-3-104(3) defines the term "collective bargaining" in the following manner:

> "... 'Collective bargaining' means negotiation by an

[19]It would appear that in the recompilation of the Labor Peace Act in the Colorado Revised Statutes 1973 the word "representatives" was inadvertently deleted from §8-3-104(4). Compare 1963 C.R.S. §80-4-2(6), with §8-3-104(4).

> employer and the representatives of a majority of its employees *who are in a collective bargaining unit* or their representatives concerning representation or terms and conditions of employment of such employees in a mutually genuine effort to reach an agreement with reference to the subject under negotiation." [emphasis supplied]

It is deemed an unfair labor practice in §8-3-108(1)(d) for an employer to refuse to bargain collectively with representatives of its employees in any "collective bargaining unit." It is, therefore, not surprising that the term "'all-union agreement' means an agreement between an employer and a *collective bargaining unit* representing some or all of his employees, whereby all of the employees of an employer in a craft or an establishment are required to be members of a single labor organization." Section 8-3-104(1) [emphasis supplied]. Consequently, before an "all-union agreement" can be negotiated, a "collective bargaining unit" must exist, and it is only in such "collective bargaining unit" that an "all-union" referendum may be conducted pursuant to §8-3-108(1)(c). See, Appendix B at 23,29.

It is further clear that only Colorado employees of an employer may populate a "collective bargaining unit." This is reflected both in the definition of "collective bargaining unit" and in the definition of "employee" in §8-3-104(11)(a).

It is important to recognize that a "collective bargaining unit" is a group of employees; it is, conversely, not a labor organization. The "collective bargaining unit" is, further, the bargaining representative of the employees in such unit. A "collective bargaining unit" can presumably designate a labor

organization as its "representative,"[20] but there is no requirement that it do so. Consequently, certification of a "collective bargaining unit" determines only that the employees in such unit desire to bargain collectively with their employer.

Section 8-3-104(4) requires that a "collective bargaining unit" be selected by a secret ballot "as provided in §8-3-107." A review of the procedures contained in §8-3-107 indicates that such provision is, indeed, *sui generis*, and it need only be briefly noted that the determination of appropriate unit status by the NLRB under §9 of the federal Act is effected in a substantially different fashion than under §8-3-107. Thus, the Labor Peace Act imposes more stringent vote requirements for certification as a "collective bargaining unit" than the federal Act does for the certification of a labor organization as the representative of a group of employees in an appropriate unit.[21] Under the federal Act the NLRB determines whether a given craft, department or plant is a unit appropriate for purposes of collective bargaining. See, e.g., *Mallinckrodt Chem. Works*, 162 NLRB 387 (1966); *Western Light & Tel. Co.*, 129 NLRB 719 (1960); *Sanborn Tel. Co.*, 140 NLRB 512 (1963); *Michigan Bell Tel. Co.*, 192 NLRB 1212 (1971); *Mountain*

[20]Section 8-3-104(17) defines "representative" as "any person who is the duly authorized agent of a collective bargaining unit." The term "person" is defined in §8-3-104(16) as "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, or receivers." Thus, a labor organization can constitute a "person."

[21]The Labor Peace Act requires that a majority of the employees in the putative "collective bargaining unit" vote for certification of such unit and that, further, a majority of those employees so voting approve the proposed "collective bargaining unit." See, §§8-3-104(4) and 8-3-107(1); App. B at 24. Under the federal Act a labor organization may be certified as the representative of an appropriate unit of employees if so designated by a majority of those valid votes cast in the representation election. Moreover, under the federal Act a labor organization can be recognized as the collective bargaining representative of a group of employees voluntarily and without the need of NLRB certification. *National Labor Rel. Bd. v. Gissel Packing Co., supra.*

States Tel. & Tel. Co., 220 NLRB No. 79 (1975). In contrast, the Labor Peace Act places substantially more emphasis on the desires of the affected employees than does the federal Act. Cf., *LaCrosse Tel. Corp. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 18, 25 (1949); see also, *Laundry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry*, 146 Colo. 31, 360 P.2d 446, 449 (1961). Under the federal Act, moreover, challenge to the eligibility of an employee to vote in a representation election must be effected at the time of voting and not, as under the Labor Peace Act, prior to the election. Compare, *Graham Furn. Co. v. Industrial Comm'n*, 138 Colo. 244, 331 P.2d 507, 510 (1958), with 29 C.F.R. §102.69 (1975). Therefore, it is manifest that the NLRB certification procedure under §9 of the federal Act is, as a general matter, substantially disharmonious with the "collective bargaining unit" election requirements of §8-3-107. It would, thus, appear that an independent "collective bargaining unit" election will be required for a federally recognized bargaining unit to be permitted to enter into an "all-union agreement" and to participate in an "all-union" referendum.[22]

[22]This fact is obviously not without practical significance. Because the unit determination procedures under the Labor Peace Act and the federal Act differ, there is no assurance or, more importantly, no requirement that the "collective bargaining unit" be coterminous with those Colorado employees in a federally recognized bargaining unit. Thus, the possibility for certification of "collective bargaining units" which differ from the Colorado scope of the federally recognized bargaining unit is not only possible but, in many instances, likely because of the "strong policy in the Labor Peace Act in favor of fractional representation of the employees of one employer." *Laundry Workers Local 304 v. Sunnyside Cleaners & Shirt Laundry, supra*, 360 P.2d at 449. Moreover, because each "collective bargaining unit" can designate its own "representative," it would appear possible for a minority union to be so designated. Consequently, there exists the possibility for groups of employees within the same federally recognized bargaining unit to be represented for the purpose of entering into an "all-union agreement" by two or more labor organizations.

B. *The Substantial Federal Questions Raised Herein.*

The substantial nature of the federal questions involved herein are apparent from the above review of the Colorado Supreme Court's decision and of the statutory framework of the Labor Peace Act. Summarized, the Colorado Supreme Court has held that, before a union security provision may be entered into and before an "all-union" referendum pursuant to §8-3-108(1)(c) may be conducted, the employees affected thereby must, within the strictures of §8-3-104(4), constitute themselves as a "collective bargaining unit." Thus, the Colorado Supreme Court held that, in the absence of any showing that the Colorado employees in the federally recognized bargaining units in this appeal have constituted themselves as a "collective bargaining unit" in accordance with §8-3-104(4), CWA had no *right* to enter into an "all-union agreement" with Mountain States or Western Electric. Further, it is clear, as developed above, that the Colorado Supreme Court validated its determination in this regard upon its construction of §14(b) of the federal Act.

Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 105 (1963) [hereinafter, *Schermerhorn* II], definitively established that "state power, recognized by §14(b), begins *only with the actual negotiation and execution of the type of agreement described by §14(b).*" [emphasis in original]. Accordingly, states may not regulate conduct prior to the negotiation of a union security provision. Cf., *Oil, Chem. & Atomic Workers v. Mobil Oil Corp.*, – U.S. –, 96 S.Ct. 2140 (1976).[23] In-

[23]In *Mobil Oil* the Court held that "§14(b)'s primary concern is with state regulation of the post-hiring employer-employee-union relationship." *Id.*, 96 S.Ct. at 2146. Thus, *Mobil Oil* reinforces the notion that §14(b) was not concerned with any aspect of the collective bargaining relationship between an employer and a labor organization until

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stantly, however, the Colorado Supreme Court has determined that, irrespective of when the state regulation at issue occurs, a state may in all situations proscribe the *application* of a given union security provision prohibited by state law. Such reasoning would appear clearly circuitous,[24] and, if sustained, it permits states to regulate matters directly related to the actual negotiation of union security provisions, *i.e.*, those federally recognized bargaining units, or portions thereof, which may enter into a valid "all-union agreement." Thus, the Colorado Supreme Court's decision clearly raises the question of how broadly, if at all, a state may regulate the negotiation and application of union security provisions pursuant to §14(b) of the federal Act. While CWA believes *Schermerhorn* II is dispositive of the issue instantly, the Colorado Supreme Court, relying in part on that decision, has held otherwise. [App. B at 28] Consequently, an important federal question is presented as to the scope of §14(b) as construed, *inter alia*, by *Schermerhorn* II.

Flowing from the Colorado Supreme Court's construction of the Labor Peace Act are the incidental effects of that statute's regulation of union security matters on other rights secured under and/or provisions of the federal Act. As construed, the Labor Peace Act prescribes not merely those kinds of union security provisions which may be validated by an "all-

such time an employee is sought to be discharged pursuant to a union security provision. The mere presence of a union security provision is necessarily premised upon a pre-existing collective bargaining relationship which, *Mobil Oil* implicitly holds, is outside "§14(b)'s primary concern."

[24]The "application" of the union security provisions at issue can only be restrained if the provisions themselves are invalid under the Labor Peace Act. The provisions *are* invalid under the Labor Peace Act, as construed by the Colorado Supreme Court, because Colorado employees, or a portion thereof, in the involved federally recognized bargaining units failed, *inter alia*, to constitute themselves as a "collective bargaining unit" prior to that point at which the union security provisions were entered into.

union" referendum but also those employee groups which are eligible (1) to enter into "all-union agreements" and (2) to participate in "all-union" referenda. Thus, for example, the federally recognized bargaining units involved in this appeal may neither enter into an "all-union agreement" nor participate in an "all-union" referendum because the Colorado employees involved, or a portion thereof, have not constituted themselves as a "collective bargaining unit" in accordance with §8-3-104 (4). As to the CWA units herein, therefore, the "all union" referendum provisions in §8-3-108(1)(c) are an irrelevancy. Yet the reason for such irrelevancy is entirely unrelated to the nature of the union security provision at issue but, rather, stems from the failure of these federally recognized bargaining units to organize themselves into a "collective bargaining unit."

Furthermore, because a "collective bargaining unit" can only be composed of Colorado employees, multi-state federally recognized bargaining units are required, as to the negotiation of union security provisions, to fragment themselves and to undergo a secret ballot election totally unrelated to any ascertainable objective of §14(b). The "collective bargaining unit" requirement effectively emasculates the *federal* right of a federally recognized bargaining unit to negotiate a union security provision which can subsequently be validated pursuant to §8-3-108(1)(c). Therefore, a substantial question arises as to whether the exercise of the §7 right to negotiate a union security provision may be circumscribed in a manner such as that espoused by the Labor Peace Act. Similarly, the "collective bargaining unit" election requirement may well have a profoundly disruptive effect on aspects of collective bargaining unrelated to the negotiation of union security provisions.[25] This

[25]Thus, it is possible that a federally recognized bargaining unit, or that portion of it subject to the Labor Peace Act, would lose the "collec-

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Court has, under different facts, struck down portions of state statutes impermissibly infringing upon §7 rights. *Hill v. Watson*, 325 U.S. 538, 541-43 (1945); *United Auto. Workers v. O'Brien*, 239 U.S. 454, 458-59 (1950); *Nash v. Florida Ind. Comm'n*, 389 U.S. 235, 238-39 (1967).

It is, further, beyond peradventure that the NLRB is possessed of exclusive jurisdiction under §9 of the federal Act to determine representational questions and that states may not infringe upon such jurisdiction. *Bethlehem Steel Co. v. New York Labor Bd.*, 330 U.S. 767, 775-76 (1947); *LaCrosse Tel. Co. v. Wisconsin Emp. Rel. Bd.*, *supra* at 25-26. The Colorado Supreme Court's decision herein holds that NLRB certification of an appropriate unit is conclusive for all purposes except as to the appropriateness of a unit for negotiating "all-union agreements" and participating in "all-union" referenda. As to union security provisions, the Labor Peace Act, as construed by the Colorado Supreme Court, authorizes recertification of appropriate unit status within the strictures of §§8-3-104(4) and 107. In *Bethlehem Steel Co. v. New York Labor Bd.*, *supra*, the Court noted:

> "Comparison of the State and Federal statutes will show that both governments had laid hold of the same relationship for regulation, and it involved the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying

tive bargaining unit" election with a concomitant, adverse effect on a labor organization's bargaining posture. Moreover, because of the peculiar nature of representation elections under §8-3-107, it is possible for only a portion of those employees of the federally recognized bargaining unit within the State of Colorado to seek "collective bargaining unit" status. The effect of multi-"collective bargaining unit" elections, some of which may be won and others of which may be lost, on the bargaining position of a labor organization can only be conducive of chaos and possible disruption of commerce.

> this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might have come out with conflicting ones as they have in the past.... But the power to decide a matter can hardly be made dependent on the way it is decided...."

As further noted in *LaCrosse Tel. Co., supra* at 26, "[t]he problem of employee representation is a sensitive and delicate one in industrial relations...."

CWA recognizes full well that the requirement of "collective bargaining unit" status as a condition precedent either to entering into an "all-union agreement" or to participation in an "all-union" referendum differs somewhat from the New York Labor Board's and the Wisconsin Employment Relations Board's assertion of concurrent jurisdiction over all representational issues. But, the Colorado Supreme Court's decision herein does permit the Colorado Division of Labor to assume jurisdiction over the quintessentially representational issue of whether a group of employees, which may be all or only a portion of a federally recognized bargaining unit, desires to form itself into a "collective bargaining unit" for the purpose of entering into a union security provision. Such a requirement, fully supported by the language of the Labor Peace Act, bespeaks a legislative determination by the State of Colorado that federally recognized bargaining units are to be viewed as appropriate for collective bargaining *except as to union security matters*. It thus appears that, to a more limited extent, the duality of state and federal control over representational

matters eschewed in *Bethlehem Steel* and *LaCrosse* exists under the Labor Peace Act. Consequently, a substantial federal question is raised as to whether §14(b) affirmatively authorizes such duality of administration.

Finally, all of the above raises the question of whether §14(b) permits any kind of "regulation" *vis-a-vis* union security provisions other than the enforcing of state statutory or constitutional provisions absolutely proscribing a particular form of union security. *Schermerhorn* II and *Algoma Plywood & Veneer Co. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 301 (1949), indicate with clarity that a state may enforce such a provision; however, neither of these decisions nor any other of this Court has definitively determined whether §14(b) authorizes the kind of regulatory scheme espoused in the Labor Peace Act. In reliance upon *Schermerhorn* II and *Algoma*, the Colorado Supreme Court held that the Labor Peace Act was a form of a "more restrictive" policy concerning union security provisions affirmatively authorized under §14(b). [App. B at 26] In contrast, the NLRB has, in several decisions, held that §14(b) anticipated only absolute prohibition of specified kinds of union security provisions. *Northland Greyhound Lines, Inc.*, 80 NLRB 288 (1948) [employees in state which regulates union security provisions are part of appropriate unit for purposes of union shop authorization election but employees in states which prohibit union security provisions must be excluded from voting in such union shop authorization election]; *Western Electric Co.*, 84 NLRB 1019 (1949) [employees in states which regulate union security provisions are part of appropriate unit for purposes of union shop authorization election but employees in states which prohibit union security provisions must be excluded from voting in such union shop authorization election]; *Safeway Stores, Inc.*, 81 NLRB 387 (1949) [union shop agreement ratified under federal union shop auth-

orization election valid even though not meeting Colorado Labor Peace Act requirements]; *Cyclone Sales, Inc.*, 115 NLRB 431 (1956) [union security agreement invalidated by Colorado "all-union" referendum does not vitiate collective bargaining agreement so as to remove contract bar arising under federal law]; *Molders Union (Malleable Iron Range Co.)*, 150 NLRB 913 (1965) [no unfair labor practice when employee discharged pursuant to union security provisions unlawful under state statute which regulates union security provisions but does not absolutely prohibit such provisions] The Court has never addressed this issue except, as mentioned above, in the context of a state's right to afford affirmative relief to any employee discharged, or threatened with discharge, pursuant to a union security provision invalid under state law. The Colorado Supreme Court's decision directly raises the issue of whether §14(b) permits states to prohibit the application of union security provisions unlawful under a regulatory scheme which does not absolutely proscribe such provisions.

CONCLUSION

CWA respectfully requests the Court to note probable jurisdiction over this appeal and the issues presented herein and to order plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed three true and correct copies of the foregoing Jurisdictional Statement and the attendant Appendix by depositing same in the United States Mail, first class postage prepaid, this ____ day of September, 1976, addressed as follows:

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